

HARRY A. ZUCKERMAN ET AL.

IBLA 78-239, IBLA 78-260,
IBLA 78-284, IBLA 78-285

Decided July 23, 1979

Consolidated appeals from decisions of the Montana, New Mexico, and Wyoming State Offices, Bureau of Land Management, each rejecting simultaneous oil and gas lease offers, for failure to date the respective drawing entry cards.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications:
Generally -- Oil and Gas Leases: Applications: Filing

Not all persons may be qualified to be lessees. Signing and dating the entry card constitute certification by the offeror of his qualifications as of a date certain.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications:
Generally -- Oil and Gas Leases: Applications: Filing

As used in 43 CFR 3112.2-1, the term "fully executed" means that the applicant must, in order to render the entry card a valid and complete offer to lease, supply the information requested thereon, including the date.

3. Administrative Procedure: Generally -- Administrative Procedure:
Burden of Proof

Broad discretion is committed to an agency in interpreting regulations. A party challenging an interpretation and the administrative application thereof must demonstrate that the interpretation is unreasonable and that the agency's application lacks a rational foundation.

4. Administrative Procedure: Rule Making -- Oil and Gas Leases:
Applications: Generally

An interpretative rule is a clarification or explanation of an existing regulation, rather than a substantive modification thereof or the adoption of a new regulation.

5. Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: First
Qualified Applicant

A first-drawn entry card creates no vested right therein; the offeror gains merely a right of priority in consideration. The Department is authorized to accept only the offer of the first qualified applicant, one who has fully complied with all mandatory regulations.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., counsel for appellants Zuckerman and collins; Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, for appellant Peterson.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Harry A. Zuckerman, A. Hawley Peterson, and Mark Collins appeal 1/ four decisions of the Montana, New Mexico, and Wyoming State Offices, Bureau of Land Management (BLM), each rejecting simultaneous offers to lease, for failure to date the respective drawing entry cards, infra.

Pursuant to the noncompetitive leasing procedure, 43 CFR 3112, appellant Zuckerman filed drawing entry cards as indicated:

1. Offer M 39480 in the Montana Office, for parcel MT 388, drawn in December 1977;
2. Offer NM 32574 in the New Mexico Office, for parcel NM 249, drawn January 10, 1978;
3. Offer W 62397 in the Wyoming Office, for parcel WY 99, drawn in December 1977.

1/ The issue is identical in each case, and as all parties join in the brief submitted herewith, we have sua sponte consolidated the four cases: IBLA 78-239 (M 39480); IBLA 78-260 (W 62397); IBLA 78-284 (NM 32537); and IBLA 78-285 (NM 32574).

In each case, appellant Zuckerman's entry card was the first drawn. In each instance, BLM rejected the offer on the ground that appellant failed to date the entry card as required by 43 CFR 3112.2-1. 2/

With regard to the first offer described above, the second drawn entry card was that of appellant Peterson. By decision dated January 25, 1978, that offer was also rejected on the ground that appellant had failed to comply with 43 CFR 3112.2-1, supra. 3/

Finally, appellant Collins' offer NM 32537, filed in the New Mexico Office for parcel NM 197, was the first drawn on January 10, 1978. By decision dated February 1, 1978, the offer was rejected on the identical ground assigned in the other cases, supra.

Several arguments are urged upon us by appellants. Before those contentions are addressed, however, we will set forth the disputed regulation, 43 CFR 3112.2-1, in material part:

(a) Entry Card. Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director. "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee. [Emphasis supplied.]

It is first argued that "[t]he regulatory language 'fully executed,' poses a question as to the requisite filing formalities, rather than answers one." In support of this proposition, appellants cite 33 C.J.S. 117-18 (1942), wherein "execute" is defined at length:

2/ Offer M 39480 was rejected by decision dated January 25, 1978. Offer NM 32574 was rejected by decision dated February 1, 1978. Offer W 62397 was rejected by decision dated February 7, 1978.

3/ We would note that it was error for the Montana State Office to reject the offer of Peterson, drawn second, before the 30-day appeal period afforded Zuckerman had expired, and any appeal made during that period had been finally resolved. While the State Office action was probably occasioned by the fact that the same reason for rejection applied to each DEC, the correct procedure is to suspend further consideration of the second and third drawn DEC's until the rejection of the first drawn DEC is final, following the 30-day appeal period and resolution of any appeal which might have been filed during that time. See generally, D. E. Pack, 31 IBLA 283 (1977).

The words "execute," "executed," and "execution" * * * convey the meaning of carrying out some act or course of conduct to its completion. Thus, when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument, importing the intended obligation, or of every act required to give the instrument validity * * * or to give it the forms required to render it valid; * * *.

Given these definitions, it is contended that use of the word "signed" in conjunction with the phrase "and fully executed," creates a question in the mind of any noncompetitive lease applicant as to whether dating the entry card is one of the "legally requisite formalities necessary to validate the contract."

Appellants' second argument is that this alleged ambiguity is demonstrated by the fact BLM published in the Federal Register notice of the revision of the drawing entry card form. In addition to describing the revision with specificity, the notice unequivocally advised the public that an entry card "must be fully completed and executed * * * in order to participate in the drawing. Failure to complete any part of the card will disqualify the applicant * * *." 39 FR 24523 (1974).

While we intend to answer all the contentions urged by appellants, we note that, in fact, the matter could properly end with resolution of these first two arguments. As will subsequently appear, appellants by their arguments seek to convert a matter of procedure into substantive rulemaking governed by the provisions of 5 U.S.C. § 553 (1976), infra. However, quite apart from any controversy regarding interpretative as opposed to substantive rules, for the guidance of the public an agency is required to separately state and publish "rules of procedure, descriptions of forms available * * *, and instructions as to the scope and contents of all papers, reports, or examinations;" (emphasis supplied) 5 U.S.C. § 552(a)(1)(C) (1976). We note in passing that appellants have not offered their views on the significance of the quoted provision as it relates to the propositions for which they contend.

Bureau Instruction Memorandum No. 75-194 was subsequently issued setting forth the changes in the processing of simultaneous offers to lease. The memorandum also advised that failure to date the entry card would require rejection therefor. Appellants correctly recognize that the memorandum lacks the force and effect of law. See Western Slope Gas Co., 40 IBLA 280, 287 n. 1 (1979). The directive is intended for the use and guidance of BLM personnel in applying the regulations, and to this end, reiterates the substance of the Federal Register publication. The assertion that the decisions of BLM and of this Board

have relied on this memorandum beyond its intended purpose is without foundation.

Appellants assert, however, that the quoted text of the published notice differs significantly from the import of the regulatory language, and that violation of these directives does not constitute a violation of the regulation.

The Department's interpretation of the regulatory language and the decisions of this Board applying that interpretation impart no specialized or novel meaning thereto. What information constitutes the legal requisites necessary to implement and fulfill the provisions of the Mineral Leasing Act, 30 U.S.C. § 226(c) (1976), has been determined by duly promulgated regulations. The requisite information is that which appears on the entry card form. Requiring strict compliance regarding the dating of drawing entry cards is not, as appellants seem to suggest, mere administrative caprice or frivolity which is dispensable at the option of an applicant. Sorenson v. Andrus, 456 F. Supp. 499 (D. Wyo. 1978).

[1] Not all persons may be qualified to be lessees, and for that reason all offerors must furnish evidence of their qualifications to hold Federal oil and gas leases. University of the Trees, 40 IBLA 74 (1979). Signing and dating the entry card constitute certification by the offeror of his qualifications as of a date certain. Viewed in light of the underlying rationale, the conclusion is inescapable that the dating of the entry card is an element of the required full execution thereof, and as such, a rational legal requisite directly affecting the contractual efficacy of the offer. See Sorenson v. Andrus, supra; Jack L. McDowell, 34 IBLA 202 (1978); Thomas C. Moran, 32 IBLA 168 (1977); Frank Dejong, 27 IBLA 313 (1976); John Willard Dixon, 28 IBLA 393 (1976); Herbert W. Schollmeyer, 25 IBLA 393 (1976).

[2] It therefore must follow that "fully executed" quite simply and logically means that the applicant must, in order to render the entry card a valid and complete offer to lease, supply the information requested thereon, including the date. Before discussing this further and appellant's third contention, we note that appellants' fourth, fifth, and sixth major arguments charge that the published notice, 39 FR 24523, supra, was in reality substantive rulemaking and therefore subject to the requirements of 5 U.S.C. § 553 (1976). In this connection, it is also urged that the Department is strictly bound by the Secretary's Statement of Policy, 36 FR 8336 (1971), in which the various components of the Department were encouraged to utilize rulemaking procedures "to the fullest extent possible."

They assert that a rulemaking procedure is mandated by the Secretary's Statement of Policy, supra. It is further argued that utilization of such a procedure would compel BLM "to confront what

information must be included in a [drawing entry] card * * *. To the extent that such information need not be included, the Bureau could make the inclusion thereof optional or eliminate the requirement altogether * * *. Additionally, rulemaking would provide clear notice to the public at large * * *."

Appellants' reliance on the Statement of Policy is misplaced. Matters relating to public property, which includes the public lands, are statutorily exempt from rulemaking requirements. 5 U.S.C. § 553(a)(2) (1976). ^{4/} The import of the policy statement is that in recognition of the value of public interest and participation, the Department was encouraged to utilize rulemaking procedures whenever possible, without regard to the exemption afforded by the statute, provided the procedure would be practical, necessary, and in the public interest. For the purpose of the remaining discussion, we shall consider appellants' arguments as if the rulemaking provision is generally applicable to the Department.

We have mentioned appellants' contention that violation of the published interpretation of 43 CFR 3112.2-1 as regards the new entry card form and the subsequent instruction memorandum may not be held a violation of that regulation, on the theory that publication of these directives conclusively proves the alleged ambiguity in the regulatory phrase "fully executed." The argument then proceeds to the third major assertion, that, based upon the foregoing, appellants are entitled as a matter of law to the result reached in A. M. Shaffer, 73 I.D. 293 (1966), and Madge V. Rodda, 70 I.D. 481 (1963), discussed, infra. A decision contrary to these authorities, the argument continues, constitutes a "radical departure from the prior policy and position of the Department" as discussed in those cases.

It is apparent that appellants misapprehend the significance of the notice published in the Federal Register, supra. Federal agencies are required to publish in the Federal Register, among other things, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" (emphasis supplied), as well as "each amendment, revision, or repeal of the foregoing." 5 U.S.C. § 552(a)(1)(D) and (E) (1976); see also 44 U.S.C. § 1510(a) (1976). Therefore, assuming arguendo that the notice is a "statement of general policy" or an "interpretation of general applicability formulated and adopted by the agency," the requirement of the statute was accomplished viz. publication at 39 FR 24523 (1974).

^{4/} The Federal Land Policy and Management Act of 1976 (FLPMA), section 310, 43 U.S.C. § 1740 (1976), provides that rules and regulations implementing that Act shall be promulgated without regard to the provisions of 5 U.S.C. § 553(a)(2) (1976).

Matters duly published in the Federal Register generally constitute constructive notice to all the world of what is therein set forth. 44 U.S.C. § 1507 (1976); Winston Bros. v. United States, 458 F.2d 49, 198 Ct. Cl. 37 (1972); United States v. Millsap, 208 F. Supp. 511 (D. Wyo. 1962); Lynsky v. United States, 126 F. Supp. 453, 130 Ct. Cl. 149 (1954).

Failure to comply with an instruction published in the Federal Register is a violation of the overlying regulation and is subject to the consequences prescribed.

We must disagree with the proposition that the mere fact of publication proves the ambiguity for which appellants contend. The argument fails to take sufficient account of the fact that the published notice was intended to announce the new and simplified drawing entry card form. Simultaneous publication of BLM's requirement of strict compliance therewith was not only logical, but expedient and efficient.

As to the applicability of Shaffer and Rodda, supra, to the facts presented here, we must also disagree. Those cases stand for the principle that before an individual can be deprived of a statutory preference right, the disputed regulation must be so clear that there can be no basis for noncompliance therewith. Moreover, the cited authorities are factually distinguishable.

In Shaffer, the issue concerned the statements required of agents and attorneys-in-fact. Appellants therein were the agents of other parties who had fully disclosed their interests in the offers and otherwise complied with the regulations pertaining to their status. The offers, however, were completed in the agents' names as offerors. The common sense issue was whether such an offeror was required by the regulations to furnish evidence of authority to sign his or her own name.

In Rodda, the issue was whether a phrase setting forth a 10-day filing period was intended to modify subsequent sentences in the regulation which described other classes of purchasers. The modifying phrase appeared only in the first sentence relating to individuals and partnerships. The ambiguity thus was a matter of simple grammatical construction.

However, putting aside the fact that the cited authorities concerned regulatory language which in common parlance suggested reasonably differing interpretations, of pivotal significance to the case before us is the fact that the regulations at issue therein had not been formally interpreted, a fact which did not escape the attention of the Assistant Secretary in Shaffer.

No doubt remains, assuming arguendo such doubt existed prior to 1974, as to what "fully executed" means in the context of simultaneous oil and gas lease offers. We therefore hold that as a matter of law the facts of these cases do not warrant the results reached in Shaffer and Rodda. We have carefully examined the other points raised in support of appellants' third argument, but they are without merit and are accordingly rejected.

[3] With regard to appellants' fourth, fifth, and sixth arguments that the rulemaking procedure was necessary in regard to the notice published by BLM, we note preliminarily, that broad discretion is committed to an agency in interpreting regulations. Royalton College, Inc. v. Clark, 295 F. Supp. 365 (D. Vt. 1969). A party challenging an interpretation and the administrative application thereof must demonstrate that the interpretation is unreasonable and that the agency's application lacks a rational foundation. Gulf Oil Corp. v. Hickel, 435 F.2d 440 (D.C. Cir. 1970). The preceding discussion of the rationale underlying the required dating of the entry card plainly negates any showing of unreasonableness. Thus, although appellants have failed to carry their burden of proof on the issue, we will nevertheless address the remaining contentions.

[4] We are compelled to reject the argument that the published interpretation of 43 CFR 3112.2-1 constituted substantive rulemaking. An interpretative rule is a clarification or explanation of an existing regulation, rather than a substantive modification thereof or the adoption of a new regulation. Schupak v. Califano, 454 F. Supp. 105 (D. N.Y. 1978); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); see 5 U.S.C. § 551(5) (1976). A brief review shows that the disputed language has appeared in 43 CFR 3112.2-1 and its precursors since at least 1964. It is obvious that the announced revision of the drawing entry card form under existing 43 CFR 3112.2-1 can not be characterized substantive rulemaking except by the most novel logic.

Regarding this argument, appellants place great reliance on the decision of Chief Judge Theis in Energy Reserves Group v. FEA, 447 F. Supp. 1135 (D. Kan. 1978), holding that a regulation of the FEA which it argued was interpretative was, in fact, substantive. That decision was appealed, however. While the case was on appeal, the District Court for the Western District of Oklahoma considered the same regulation, taking note of Judge Theis' decision, but nevertheless ruling that the regulation was clearly interpretative. See Grace Petroleum Corp. v. DOE, 456 F. Supp. 945 (1978). Subsequently, the Temporary Emergency Court of Appeals reversed Chief Judge Theis' decision, specifically rejecting the arguments cited by appellants herein. See Energy Reserves Group, Inc. v. DOE, 589 F.2d 1082 (1978). Thus, the opinion of Chief Judge Theis can afford appellants no comfort.

Moreover, BLM and the decisions of this Board have consistently required strict compliance with the regulations governing noncompetitive oil and gas leasing. See, e.g., Adobe Oil and Gas Corp., 34 IBLA 13 (1978) (omission of signature); Henry A. Alker, 34 IBLA 136 (1978) (incorrect parcel number); Violet Kern, 33 IBLA 68 (1977), and Tina A. Regan, 33 IBLA 213 (1977) (partial dates); Marcia P. Lane, 33 IBLA 150 (1977) (incorrect abbreviation for State prefix); James H. Scott, 25 IBLA 384 (1976) (entry card filed in incorrect office); Beverly J. Steinbeck, 27 IBLA 249 (1976) (omission of zip code); Hartley L. Gordon et al., 27 IBLA 315 (1976) (omission of offeror's address); Lyle A. Todd et al., 26 IBLA 246 (1976) (failure to file statements of interested parties); Robert A. Ferguson, 20 IBLA 299 (1975) (untimely filing); John F. Brown, 21 IBLA 260 (1975) (use of incorrect form); Robert D. Houston, 12 IBLA 336 (1973) (defective annual rental and parcel description). Strict compliance with the regulations is required to protect the rights of the second and third drawn qualified offerors. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd per curiam, 544 F.2d 1067 (10th Cir. 1976).

We have expressed our view that the drawing entry card states the irreducible minimum requirements for leasing Federal lands. We have also demonstrated that the dating of that entry card is not dispensable under any construction of the phrase "fully executed." Therefore, to the extent that appellants contend for a rulemaking procedure on the theory that the dating of the entry card is unnecessary as a matter of law, or that it would provide a method of notice to the general public superior to publication in the Federal Register, such a procedure is impractical, unnecessary, and contrary to the public interest. Other points in support of these final arguments have been carefully reviewed and found without merit.

[5] A first-drawn entry card creates no vested right therein; the offeror gains merely a right of priority in consideration. Ballard E. Spencer Trust, Inc., supra; Barbara A. Joeckel, 30 IBLA 376 (1977); Amy H. Hanthorn, 27 IBLA 369 (1976); C. Burglin et al., 21 IBLA 234 (1975). The Department is authorized to accept only the offer of the first qualified applicant, 30 U.S.C. § 226(c) (1976), one who has fully complied with all mandatory regulations. Sorenson v. Andrus, supra; Manhattan Resources, Inc., 22 IBLA 24 (1975); Southern Union Production Co., 22 IBLA 379 (1975).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge.

